

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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4 UNITED STATES OF AMERICA, : 98-CR-1101(ILG)
5 Plaintiff, :
6 -against- : United States Courthouse
7 JOHN DOE, : Brooklyn, New York
8 Defendant. : January 10, 2012
9 : 2:30 o'clock p.m.

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11 TRANSCRIPT OF STATUS CONFERENCE
12 BEFORE THE HONORABLE I. LEO GLASSER
13 UNITED STATES SENIOR DISTRICT JUDGE.

14 APPEARANCES:

15 For the Government: LORETTA LYNCH
16 United States Attorney
17 BY: TODD KAMINSKY
18 EVAN M. NORRIS
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1 THE CLERK: This is USA versus Doe. 98-CR-1101.
2 Counsel, please state your name for the record.

3 MR. KAMINSKY: Todd Kaminsky and Evan Norris for the
4 United States. Good afternoon, Your Honor.

5 MR. NORRIS: Good afternoon, Judge.

6 THE COURT: You are?

7 MR. NORRIS: Evan Norris.

8 THE COURT: You are new to this case?

9 MR. KAMINSKY: Your Honor, Mr. Norris has been
10 involved in some of the ex parte submissions to the Court
11 about new developments the case has taken and he's been in
12 charge of that area of the case and we're working together on
13 this.

14 MR. BEYS: Michael Beys and Jason Berland for John
15 Doe. Good afternoon, Judge.

16 THE COURT: Good afternoon.

17 MR. KAMINSKY: Your Honor, I think Mr. Norris is a
18 little more equipped to speak about where we are so I'm going
19 to let him, if Your Honor allows.

20 MR. NORRIS: Your Honor, in the mandate that was
21 issued and summary order of December 20th, the Second Circuit,
22 as Your Honor knows, has directed that a number of matters be
23 taken up at this time.

24 THE COURT: Well, to begin with, the Second Circuit
25 is still directing that I deal with a motion which you made

1 some time ago, back in March of last year, to review the
2 record with respect to what needs or what need no longer be
3 sealed and the Court of Appeals is still directing me to deal
4 with that motion.

5 Nobody has undertaken -- by nobody, I mean the
6 government certainly -- has undertaken to tell the Court of
7 Appeals that there is no motion anymore, although there was, I
8 believe, sometime maybe in August, an indication to the
9 Circuit that the motion has been withdrawn.

10 MR. KAMINSKY: That's correct.

11 THE COURT: So there is no motion for me to deal
12 with that they keep telling me to respond to.

13 In addition to that, the Court of Appeals has no
14 idea, I guess because nobody has told them as far as I know,
15 that there have been repeated requests to do nothing because
16 there is an ongoing investigation with John Doe and the
17 integrity or the significance of that investigation would be
18 prejudiced, at least so the government keeps telling me, in
19 their request to keep the matter sealed. The Court of Appeals
20 does not know that, neither does Lerner.

21 With respect to Lerner, you have been copied, not
22 you, but you have been copied with his incredible missives
23 that I keep getting and it seems to me that some response by
24 you is appropriate but I never see one.

25 Excuse me for interrupting you. Let me hear what

1 you have to say. I mean, I think I have responded to that
2 Court of Appeals mandate which I have not undertaken to write
3 to the Court of Appeals and tell them, look, there is no
4 motion for me to respond to, it has been withdrawn, and I am
5 not doing anything with respect to sealing or unsealing
6 because the government is asking me not to since there is a
7 continuing investigation.

8 What else is there?

9 MR. NORRIS: Well, certainly, Your Honor, last
10 August, after the initial summary order came out from the
11 Court of Appeals, we first moved in the Court of Appeals to
12 amend the summary order in light of the matters that Your
13 Honor referred to and we discussed in detail with the Court of
14 Appeals what was going on and why that necessity existed, so I
15 believe they are aware of the change in circumstances.

16 THE COURT: But why did they keep asking me to
17 address the motion which no longer exists?

18 MR. NORRIS: And they have also subsequently, I
19 believe, been notified that Your Honor, after they've directed
20 us -- after they denied our motion to amend and directed us
21 instead to --

22 THE COURT: Withdraw the motion.

23 MR. NORRIS: -- seek to withdraw the motion --

24 THE COURT: Right.

25 MR. NORRIS: -- we've told the Court of Appeals

1 we've done that and Your Honor has granted it. So I can't
2 speak to why they left it in their mandate, but I believe they
3 are on notice as to what has transpired.

4 THE COURT: Okay.

5 MR. NORRIS: That leaves the open question as to
6 when Roe is going to find out that the motion is not pending.
7 Certainly, the recent filing that he has made assumes that our
8 unsealing motion is still pending.

9 THE COURT: Well, the only way the Court of Appeals
10 is going to get to that is they are going to mandate me, I
11 suppose, eventually, and I will have to tell the Court of
12 Appeals, look, there's no motion for me to respond to and the
13 Court of Appeals and the United States Attorney has been
14 asking me to do nothing.

15 Let me just cut through all this.

16 This case has evolved into this incredibly complex
17 file. I must have what amounts to three feet of paper, maybe
18 more, that has been generated in this case.

19 Now, what I'm going to direct the government and
20 John Doe to do -- let me just back up a minute.

21 This case originated and what was only before me was
22 a request to temporarily restrain the use of a cooperation
23 agreement and a presentence report or whatever other document
24 there may have been, there may have been some proffer
25 agreement papers, that was annexed to a civil action in the

1 Southern District. I granted a TR0. There have been
2 applications to extend the TR0 for awhile. There was a
3 preliminary injunction which was issued. I don't recall
4 whether the injunction was ever made permanent but I think it
5 was.

6 MR. NORRIS: It was not, Your Honor.

7 THE COURT: Okay.

8 MR. KAMINSKY: Only with respect to the PSR.

9 THE COURT: So that is all there is. That is all
10 that this case was about. How it evolved into what it is now,
11 just beginning to think about how it got this way is
12 mind-boggling.

13 What I am going to direct you and John Doe to do is
14 give me a very detailed account, with the transcripts, of what
15 was essentially the core issue in this case and how it evolved
16 from there into what was a major First Amendment, privacy,
17 press enterprise, Richmond newspapers, Globe, John Doe, I mean
18 these letters that we keep getting from Mr. Lerner.

19 At that point, when I am clear and everybody is
20 clear as to essentially what is before me, which is that
21 injunction, we will either issue it or deny it, and insofar as
22 everything else is concerned in this case, whether everything
23 else has to be sealed or unsealed will, I think, follow as
24 matter of course from there.

25 That is all this case is about. It was about a

1 direction to a lawyer who, as I have indicated on the record
2 before, has irresponsibly utilized documents which were
3 clearly filed under seal and the application was made to
4 enjoin him from continuing to do it and to return the papers
5 which were sealed which was the cooperation agreement and the
6 presentence report which never should have been utilized
7 anyway. That is all this case was about.

8 I do not know where you are now. I do not know
9 whether he is still cooperating or is not cooperating, he is
10 still cooperating, but that is not before me. That is not
11 this case anymore. 98-1101 was closed years ago. It was
12 closed the last time I sentenced this defendant. Now, all of
13 this has erupted as a result of the unauthorized use of
14 documents which were under seal.

15 MR. KAMINSKY: Your Honor, so I think that our
16 proposal that we were going to come to the Court with is not
17 so different from what Your Honor recommends or would like to
18 do and what we thought -- where things left off, from the
19 government's perspective, is that Your Honor was in a position
20 where Your Honor said, this is when Doe had previous counsel
21 of Ms. Moore and Ms. Caldwell, said, listen, please brief to
22 me whether I -- the PSR, I'm on solid ground with that. That
23 I'm enjoining, period, but with these other documents, a
24 cooperation agreement, an information and two proffer
25 agreements, I am not certain whether I am on firm ground, if I

1 can permanently enjoin these documents, please brief me as to
2 where we are. We never got to that point because a notice of
3 appeal to the Second Circuit was filed.

4 The government argued to the Second Circuit, when
5 the case went up there, this is not ripe for appellate review
6 because it was a TRO that was premature, the Judge didn't even
7 get a chance to make a ruling on that, it's not ripe for
8 appellate review, and the Court agreed and the Court sent back
9 down to us, which was repeated in this mandate, Judge Glasser,
10 please now rule on these other non-PSR documents. What we
11 wanted to do was issue a briefing schedule where the
12 government in a short amount of time would respond to Your
13 Honor's request which was made a long time ago and, of course,
14 our position, which we laid out to the Second Circuit, you
15 know, we had one part of our argument which said this is not
16 ripe for appellate review but, of course, we had another one
17 saying in case you find it is, here's why those documents
18 should be sealed.

19 So, of course, we're going to argue that you do have
20 the power to have those sealed and we have well researched
21 cases about that.

22 THE COURT: I think the Court of Appeals said that I
23 have authority, the fact that it was up on appeal, that it was
24 pending. I think I indicated in a brief opinion, I was
25 uncertain in view of the fact that the matter was on appeal

1 whether I was divested of jurisdiction by virtue of that
2 filing. They then sent it back and said that I wasn't
3 divested of jurisdiction and they told me I could continue to
4 do it and that is pretty much where it was.

5 Now, if there is going to, and there will be, I am
6 directing you to do it, what I've asked you to do, I want a
7 chronological evolution of where we are now or how we got to
8 that point of determining whether the cooperation agreement,
9 the proffer agreement, should remain sealed, although it may
10 all be, I don't know, moot by now. I am not sure. You will
11 have to inform me.

12 Of course the motion or the briefing is going to
13 have to be on notice to Lerner who is going to have the
14 opportunity to respond to all of that since the injunctions
15 and the temporary restraining orders are directed not to his
16 client and we will get to the end of this.

17 All right?

18 MR. KAMINSKY: Your Honor, our understanding is that
19 there's a fairly high likelihood, if not a certainty, that
20 Rowe will continue to make motions or a new motion to unseal
21 the docket itself and other parts of the docket, and we think
22 in accordance with the mandate and where we are, that it would
23 make more sense to resolve the issues that Your Honor has put
24 in front of us with respect to the documents subject to the
25 TR0 at which point once that is resolved, we can all take a

1 deep breath and go back to the task of determining what can be
2 sealed. As you know, assuming that there's nothing current
3 going on, we're amenable to reasonably going through that task
4 and coming up with answers for Your Honor.

5 THE COURT: Now, at some point a long time ago, at
6 one of the hearings, I had said, you know, I do not know how
7 this case got sealed to begin with. I was never, never able
8 to find any order directing that the matter be sealed.

9 I think you all know that since that time, the day
10 sheet was found sitting in a corner of the Deputy Clerk's,
11 former Deputy Clerk's room which clearly indicates that an
12 application was made to seal the docket and it was granted.
13 So the case was properly sealed which is reflected by that day
14 sheet.

15 Now, the transcript of that proceeding is just not
16 available. The court reporter has long since died and even
17 when he was alive, it was a great deal of difficulty reading
18 his notes to begin with, but in any event, there is clearly a
19 record from the day sheet as to the existence of an order
20 sealing the docket initially, sealing the case initially.

21 All right. Is there anything else?

22 We have not given you an opportunity to say a word.
23 Is there anything you would like to say?

24 MR. BEYS: I don't have much to say, Your Honor.

25 THE COURT: Okay.

1 MR. BEYS: I would respectfully correct one thing
2 Mr. Kaminsky said.

3 THE COURT: Yes.

4 MR. BEYS: Which is I think there was one brief that
5 Ms. Moore submitted on the non-PSR documents and something is
6 telling me November 24th of 2010, I will double check that,
7 but I don't think it's fully briefed. I don't think Richard
8 Roe had an opportunity to put anything in there.

9 MR. KAMINSKY: Did I say it was?

10 MR. BEYS: No. I think you said it has not been
11 fully briefed but there was Ms. Moore's --

12 MR. KAMINSKY: Right.

13 At any rate, Your Honor, a funny thing happened at
14 some time in between. You know, Roe and Doe were the parties
15 before you and at some point, the government jumped full into
16 the pool, if you will, and I guess that occurred at the time
17 when the Second Circuit started sending us notices and we
18 realized that, you know, we would be the ones responding. So
19 certainly Ms. Moore was litigating deftly, but the government
20 has not got a chance to brief to Your Honor as to why the
21 document should be sealed and we're happy to append something
22 about that to the chronology that you're asking for.

23 THE COURT: Well, it seems to me the government was
24 quite clearly appropriate, an appropriate party. It was in
25 your interest having this docket sealed to begin with based on

1 the government's application initially, at the very beginning.
2 Jonathan Sack who was the Assistant U.S. Attorney at the time
3 requested that this docket be sealed. You obviously have an
4 interest in the integrity of your own, your own case.

5 So, I am going to issue an order on notice to
6 Mr. Lerner directing the government or the parties to brief
7 the remaining issue before us, the only issue that is really
8 before us. I am going to ask you to send me a brief
9 memorandum of precisely what it is that requires briefing and
10 final consideration of this issue.

11 MR. BEYS: Your Honor, would you like to know the
12 latest developments in the Southern District or would you
13 prefer not to?

14 THE COURT: Who is Judge Engelmayer? Did he replace
15 Judge Buchwald?

16 MR. BEYS: It was transferred to him I think
17 randomly.

18 THE COURT: Because I noticed Mr. Lerner is cc'ing
19 Judge Engelmayer.

20 Yes, what is going on in the Southern District?

21 MR. BEYS: The case was transferred in August to
22 Judge Engelmayer. In October, we settled the parallel action
23 that John Doe brought against Josh Bernstein who Your Honor
24 has referred to as the converter, the person who took the
25 documents and gave them to Richard Roe.

1 THE COURT: Right.

2 MR. BEYS: As part of the settlement, Bernstein
3 provided an affidavit where he did provide some detail as to
4 how it was turned over to Richard Roe, not totally
5 inconsistent with the testimony Your Honor heard which was
6 late at night, Oberlander went there and got the documents
7 from him in his apartment. There was some inducement there.
8 Basically, Richard Roe convinced Bernstein that there was a
9 common interest privilege and that it was in Mr. Bernstein's
10 interest to turn everything over to him. For what it is
11 worth, there was, in my estimation, some false testimony by
12 Mr. Roe that there was absolutely no inducement.

13 THE COURT: Was that testimony before me at a
14 hearing?

15 MR. BEYS: Yes.

16 THE COURT: I don't recall that but that is why I
17 want the transcripts.

18 MR. BEYS: The word he kept using --

19 THE COURT: Pardon. I'm sorry. Go ahead.

20 MR. BEYS: The word he kept using was "unsolicited"
21 and based on Bernstein's testimony, there was clear
22 solicitation.

23 And finally, Your Honor, Judge Engelmayer extended
24 Roe's client's deadline to bring a Southern District action, a
25 sanitized complaint without any reference to sealed documents

1 which was Judge Buchwald's initial order until January 19th.

2 THE COURT: Who is Roe's client?

3 MR. BEYS: Jody Chris, a former employer. Jody
4 Chris and Michael Edgecam, former employees of Doe's company.

5 THE COURT: What's the nature of that action
6 exactly?

7 MR. BEYS: We maintain it's really an employment
8 matter masquerading as a civil RICO action.

9 THE COURT: Okay. And Doe is the defendant in that
10 case?

11 MR. BEYS: Doe is one of about 20 defendants as you
12 would expect with Richard Roe litigating. Law firms have been
13 named. Accounting firms have been named. It's a kitchen sink
14 approach but, yes, John Doe is one of the defendants.

15 MR. KAMINSKY: Your Honor, may I have a minute to
16 speak with Mr. Norris out of earshot?

17 THE COURT: Sure.

18 MR. KAMINSKY: But I think I may have a question for
19 you but I don't want to unnecessarily waste your time.

20 THE COURT: Go ahead.

21 (Pause.)

22 THE COURT: All right.

23 MR. NORRIS: Your Honor, just two last things.

24 If we could, could we propose a briefing schedule to
25 Your Honor?

1 THE COURT: Yes, absolutely.

2 MR. NORRIS: What we had proposed was January 31st
3 for the government to submit its initial brief.

4 THE COURT: Okay.

5 MR. NORRIS: February 21st for both Doe and Richard
6 Roe to file any opposition paper, any response. February 28th
7 any reply from the government and then if the Court needed
8 oral argument, then we could do that on March 6th if the Court
9 is amenable.

10 THE COURT: Right. Why don't you put it all down in
11 a memorandum. Also indicate what specifically requires to be
12 briefed.

13 MR. NORRIS: Very well.

14 THE COURT: I also want that chronology with the
15 evolution of this to where we are.

16 MR. NORRIS: We'll do a full factual section
17 attempting to give as much chronology as we can to the Court.
18 If there's anything that we leave out, we'll certainly try to
19 amend it in our reply, but we'll try to give from the very
20 start to the very finish all of the facts so the Court has it
21 in one place.

22 THE COURT: What I'm asking for essentially is the
23 core issue in this case, the initial temporary restraining
24 order, what brought it here and where it is, I mean, how it
25 got to, got to what I'm getting from these submissions is

1 something which I'm just beginning to, I actually started to
2 write on this a long time ago, but it just grew exponentially.

3 MR. KAMINSKY: Your Honor, we will absolutely do
4 that.

5 As somebody who has been in this process as long as
6 Your Honor has from the beginning, in terms of 98-CR-1101,
7 part 2, if you will, sentencing on forward, my understanding
8 at the very lowest level is what happened is Your Honor called
9 Roe before the Court and said what's going on here with these
10 documents and their answer was not only am I entitled to have
11 the documents and are you not entitled to stop me, but I'm
12 entitled to everything else, so not only do I want these, I
13 want the docket unsealed, I want this and every other thing
14 and here's the law saying I can do that and we will put that
15 more formally supported by transcripts and what have you, but
16 that's essentially I think where we are.

17 THE COURT: I think he said he had a First Amendment
18 right to do all that at the time. I recall that.

19 In any event, this transcript will be sealed until I
20 decide to unseal, if I decide to unseal this docket. Okay?

21 MR. KAMINSKY: Thank you, Your Honor.

22 MR. BEYS: Thank you, Judge.

23 THE COURT: Put it in writing as to a briefing
24 schedule and exactly what it is that has to be briefed and I
25 will issue an order, a briefing schedule.

1 MR. BEYS: May the parties have copies of the
2 transcript?

3 THE COURT: Of course.

4 MR. BEYS: Thank you, Judge.

5 MR. NORRIS: Thank you, Judge.

6 (Matter concluded.)
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